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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, *et al.*,
Petitioners,

v.

JENNIFER K. HARBURY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at New York University School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy with a goal of promoting equality and human dignity, while safeguarding fundamental freedoms. Among the issues on which the Brennan Center works is ensuring that our nation carries out its promise of equal justice for all, a promise that is endangered by the petitioners' position in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves United States citizens' right of access to the courts – "one of the highest and most essential privileges of citizenship," and "the right conservative of all other rights, [which] lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

Petitioners urge the Court to hold that this essential privilege of citizenship is not transgressed when the government lies to a citizen about its involvement in the death of the citizen's spouse, and does so expressly to prevent a judicial challenge to its conduct. This Court could not do so without extinguishing the substance of this right – a right that is "well-established" and that, at its core, forbids government from "actively interfering" with a citizen's "presentation of claims to the courts." *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996). Indeed, it is hard to imagine a denial of access to the

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[1]The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

courts more deliberate, pervasive and pernicious than the one at issue in this case. For more than two years, officials throughout the United States Government lied to respondent Jennifer Harbury in an effort to keep her from seeking access to the courts to save her husband's life. Specifically, these officials repeatedly told Harbury they had no information about her husband, when, in truth, they knew – on the basis of official CIA communications – that he had been captured by the Guatemalan military and was being secretly detained and tortured, with the acquiescence (and possible involvement) of U.S. Government agents. The courts of appeals are uniform in recognizing that parallel action covering up official misconduct, and thereby preventing legal claims for redress, violates the right of access to the courts. The case here is even more compelling, for the Government did not merely seek to cover up a murder that had already occurred to avoid monetary relief. In this case the Government denied Harbury the right to use the courts to try to save her husband's life.

It is no answer to say, as petitioners do, that Harbury's right of access to the courts should be subordinated to the national security and foreign policy interests that were purportedly at stake when these officials systematically lied to Harbury. The Government has defenses at its disposal that insulate it from lawsuits that threaten national security interests, but it has not invoked them here. And, as will be demonstrated, petitioners' other arguments seek to distort the law of standing and remedies to prevent Harbury from vindicating a well-established right. These procrustean efforts are required because the conduct Harbury challenges is obviously "active interference" with her ability to go to court to vindicate her claims, and is thus plainly unconstitutional under governing law.

The Court should not accept petitioners' invitation to adopt a rule that would so fundamentally interfere with its own ability to serve as a check on the lawfulness of government action. Instead, this Court should take this opportunity to reaffirm the important principle that ours is emphatically "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). It is the right of access to courts that ensures that this remains as true today as it was two hundred years ago.

STATEMENT OF THE CASE

Jennifer Harbury, on her own behalf and as administratrix of the estate of her late husband, Efrain Bamaca-Velasquez, brought this lawsuit in 1996 against the State Department, the National Security Council (NSC), and the Central Intelligence Agency (CIA), as well as several officials of those agencies.[2]

Bamaca, a citizen of Guatemala and a commander in the resistance movement, disappeared on or about March 12, 1992 in Guatemala. The Guatemalan Army reported that he had committed suicide during a skirmish between government and rebel troops and was buried nearby. In truth, Bamaca had been captured alive and secretly detained by the Guatemalan military. *Harbury v. Deutch*, Pet. App. 2a-3a. Within a week of his capture, the CIA informed both State Department and NSC officials that the Guatemalan military would likely fabricate his death in order to maximize its ability to obtain information from him. *Id.* at 6a.

In early 1993, Harbury spoke to an eyewitness who indicated that her husband was alive, and was being secretly

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[2]Because this case comes to the Court on a motion to dismiss, the allegations in respondent's complaint are taken to be true.

detained and tortured by the Guatemalan military. *Id.* at 3a. She immediately contacted State Department officials, including several of the petitioners, told them what she had learned, and asked them for information about Bamaca's status. *Id.* These officials promised to look into the matter and to assist her. *Id.* Although they knew of the earlier CIA report indicating that Bamaca was still alive, they lied to her and told her they had no information. *Id.* at 6a.

In August 1993, Harbury opened the grave purportedly holding Bamaca's remains and discovered that the body in the grave was not that of her husband. *Id.* at 3a. She immediately informed petitioner Marilyn McAfee, the Ambassador to Guatemala, who promised to investigate and report back her findings. *Id.* McAfee knew of the CIA report concerning Bamaca. Yet, when she responded to Harbury, she too lied, indicating that no information was available concerning his fate. *Id.* at 6a.

From October 1993 to October 1994, respondent met with various State Department officials, including petitioners, pleading for information. *Id.* at 3a. By then, petitioners had received additional reports about Bamaca. They continued to lie to Harbury, telling her they were seeking information but none was available. *Id.* at 3a-4a.

In October 1994, the CBS news program "60 Minutes" reported that the U.S. Embassy in Guatemala possessed an intelligence report confirming that Bamaca had been captured alive. *Id.* at 4a. The State Department confirmed the report, but insisted it did not know whether Bamaca remained alive. *Id.* Respondent then met with petitioner Anthony Lake, the National Security Advisor, who falsely told her that the Government had "scraped the bottom of the barrel" for

information about her husband but that no further information existed. Suspecting that Lake and other officials were lying, respondent filed a Freedom of Information Act (FOIA)request in January 1995. *Id.*

In March 1995, a member of Congress announced that Bamaca had been killed on the orders of a paid CIA asset. *Id.* at 4a-5a. Shortly thereafter, Harbury was provided documents pursuant to her FOIA request that indicated that Bamaca had been captured, secretly detained, and tortured for approximately 18 months prior to his death by Guatemalan assets who were paid by the CIA to obtain information about the Guatemalan resistance. *Id.* at 3a, 5a. She further learned that State Department and NSC officials, including those who claimed to have no information about Bamaca's fate, had known all along that Bamaca was alive and being tortured. *Id.* at 5a-6a.

Harbury then brought this lawsuit. She asserted, *inter alia*, that petitioners violated her constitutional right of access to the courts by deliberately misleading her into thinking that no information existed about the fate of Bamaca, thereby preventing her from taking the legal action necessary to save his life. Had petitioners not done so, Harbury alleged, she would have learned of the Government's complicity in Bamaca's kidnaping and torture prior to the time of his execution, and sought injunctive relief to save his life.

In March 1999, the District Court dismissed Harbury's constitutional claims. *Id.* at 30a. The court held that she did not state a valid access to courts claim because she did not allege that she had previously sought and failed to obtain a state court remedy. The court went on to hold that even if she had done so, the defendants would be entitled to qualified immunity. *Id.* at 43a-49a.

The D.C. Circuit reversed. The court concluded that the complaint adequately alleged both a claim that Harbury's right to petition the courts had been violated, and that she had been injured as a result – noting that by the time she learned of the Government's complicity in her husband's imprisonment and torture, it was too late to pursue legal action to save his life. *Id.* at 24a-25a. With respect to the petitioners' claim of qualified immunity, the court emphasized that Harbury had alleged deceptions made for the express purpose of preventing her from filing a suit in court. *Id.* at 27a. Given that, and given that every court of appeals to have considered the question had recognized that a government cover-up of facts designed to keep a plaintiff from filing a claim constitutes a violation of the right of access to the courts, the court held that it was "obvious" that public officials may not affirmatively mislead citizens in order to prevent them from testing in court the legality of government officials' actions. *Id.* at 28a.

Denying a motion for rehearing, the D.C. Circuit provided a fuller explanation of its ruling, and responded directly to the arguments petitioners advance here. Rather than "open[ing] the courts to a flood of constitutional access to courts claims," the court explained, its holding applied only to situations where "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit." *Id.* at 61a-62a (emphasis in original). The court further noted that Harbury's claim was permitted because "defendants' actions 'completely foreclosed' one of her primary avenues of relief" and because "most of the essential facts" of her cause of action were hidden. *Id.* (internal citations omitted). Finally, in response to the assertion that the holding below would harm national security, the court noted the defendants had failed to raise a national security defense, but that they remained free to do so. *Id.* at 62a.

ARGUMENT

I. ALLEGATIONS THAT A GOVERNMENT OFFICIAL LIED TO A CITIZEN ABOUT GOVERNMENT CONDUCT IN ORDER TO SHIELD THAT CONDUCT FROM JUDICIAL REVIEW STATE A CLAIM FOR A VIOLATION OF A CITIZEN'S RIGHT OF ACCESS TO THE COURTS.

The question in this case is narrow, but critically important: whether the Government violates a citizen's right of access to the courts by deliberately lying to that citizen about the existence of critical information that would substantiate a legal challenge to the government's conduct, and does so expressly to prevent the citizen from bringing such a challenge. The question answers itself.

The right of access to the courts is "well-established." *Lewis v. Casey*, 518 U.S. at 350. The right is rooted in the Due Process Clause of the Fifth Amendment, as well as the First Amendment right "to petition the Government for a redress of grievances." U.S. Const. Amend. I. It is "one of the highest and most essential privileges of citizenship." *Chambers*, 207 U.S. at 148. Indeed, it is the "very essence of civil liberty." *Marbury v. Madison*, 5 U.S. at 163. It serves as a fundamental check on "the awesome authority of the State." *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996). Without it, our system would cease to be a "government of laws, and not of men." *Marbury*, 5 U.S. at 163; *see also Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545-46 (2001) (invalidating governmental program that sought "to insulate the Government's laws from judicial inquiry" and noting that such a scheme is inconsistent with "accepted separation-of-powers principles").

At its core, this constitutional right protects against governmental action "actively interfering" with a citizen's ability to press a legal claim in the courts. *Lewis,* 518 U.S. at 349-50. *See* Brief of United States as Amicus Curiae Supporting Petitioners, at 8 ("Gov. Br.") (right of access is "a negative prohibition on governmental conduct that prevents an individual from presenting independently identified grievances to a court of law"). The Court has acknowledged and enforced this right in a variety of settings. The Court has, for example, invalidated regulations that allowed prison officials to prohibit prisoners from filing court documents. *See Ex Parte Hull*, 312 U.S. 546, 548-49 (1941) ("Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.") (citations omitted). Restrictions on prisoners' ability to obtain assistance in preparing and filing claims have also been invalidated on the ground that they "unjustifiably obstruct the . . . right of access to the courts." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (invalidating regulation prohibiting use of law students to interview prisoners) *overruled on other grounds* by *Thornburgh v. Abbott,* 490 U.S. 401 (1989); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (invalidating regulation barring inmates from assisting other inmates in preparing habeas petitions); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (striking down rule barring inmates from assisting in preparing certain claims, and noting that "[t]he right of access to the courts . . . assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights"). Indeed, prisons must provide prisoners with some affirmative assistance to ensure that their ability to seek access to the courts is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

Similarly, federal statutes cannot be construed to "actually affect the exercise" of the right of access, even where the Government's underlying purpose is laudable. Thus, for example, in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Court declined to construe the National Labor Relations Act to prohibit an employer from suing an employee, even if the employer was seeking to retaliate for union activity. Because the "First Amendment right of access to the courts" is so fundamental, the Court held, "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Id.* at 742-43; *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (the "First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts . . . for redress of alleged wrongs'") (internal citation omitted); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (holding good-faith litigation protected against antitrust action on the ground that the "[t]he right of access to the courts is . . . one aspect of the right of petition").[3]

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[3]This Court has also struck down prohibitions on referrals to attorneys that impaired an individual's access to the courts. In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1963), the Court invoked the First Amendment to invalidate an injunction prohibiting referrals to specific lawyers. "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights." *Id.* at 7. Similarly, in *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), the Court invalidated a state decision prohibiting unions from employing attorneys to represent their members in workers' compensation claims. Noting that "to petition for a redress or grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights," *id.* at 222, the Court explained that "[w]e have . . . repeatedly held that laws which actually affect the

Drawing on these precedents, the courts of appeals have uniformly held that the Government violates the right of access to the courts by deliberately using falsehoods to conceal from a citizen facts that, if known, would have provided the citizen with grounds to seek legal redress. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress."); *Ryland v. Shapiro*, 708 F.2d 967, 973-75 (5th Cir. 1983) (A litigant's right is prejudiced by "[c]onduct by state officers which results in delay in the prosecution of an action in state court."); *Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively."); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged."); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) ("[I]f a party engages in actions that effectively cover-up evidence . . . they have violated his right

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exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." *Id.*; *see also United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (striking down injunction that barred a union from providing assistance to its members, and reaffirming decisions holding that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); *NAACP v. Button*, 371 U.S. 415, 444 (1963) (striking down a Virginia statute that prohibited the NAACP from directing potential litigants to NAACP staff attorneys).

of access to the courts."); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) ("[T]he Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers-up evidence.").

The Second Circuit's decision in *Barrett* is particularly instructive. *Barrett* involved the death of a patient who had been administered the hallucinogenic drug mescaline against his will in a state-run psychiatric hospital. The Army Chemical Corps provided the drug as part of an experiment. The Corps conspired with the attorney representing the state to hide these facts. Although the estate was informed that all information that existed had been provided, pursuant to the cover-up a great deal of information was withheld, and relevant documents (the existence of which was hidden) were sent to another state in order to evade discovery. The Second Circuit concluded that the conspiracy amounted to an unconstitutional denial of access to the courts. Although the federal officials "were not under any duty to volunteer to the estate information that would alert it to the existence of a claim," the court concluded, "the government officials were not free to arbitrarily interfere with the estate's vindication of its claims." 798 F.2d at 575.[4]

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[4]Similarly in *Bell*, police officers shot and killed an unarmed man, then covered up their actions to prevent the family from seeking legal redress. The court observed that a right to petition the courts exists, and that "[t]o deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses." 746 F.2d at 1261. Instead, "[t]his constitutional right is lost where . . . officials shield from the public and the victim's family key facts which would form the basis" of a claim. *Id.* A contrary conclusion, the court recognized, would simply encourage government officials to lie to prevent the vindication of protected rights. In *Ryland*, the Fifth Circuit reached the same result where a government official murdered a woman, and other government officials conspired to conceal the murder by falsifying the cause of death and lying about the

The official conduct Harbury challenges in this case is active interference with her ability to vindicate her legal rights in court. It is precisely what this Court described in *Lewis* as the core of the protected right. As in *Barrett*, the relevant information was not classified (indeed, it was later released in response to a FOIA request). Nonetheless, government officials lied to her over the course of two years, repeatedly telling her that no information existed when, in fact, it did. They did so to prevent her from learning about this information and using it to file a claim. And they succeeded. Because Harbury believed what she was told, she did not learn the true facts of her husband's detention until he was dead. These allegations squarely state a violation of the right of access even as that right is framed by the Government in this case – "a negative prohibition on governmental conduct that prevents an individual from presenting independently identified grievances to a court of law." Gov. Br. at 8.

Lacking any persuasive answer to the allegations Harbury has actually made, petitioners (and the Government) proceed to set up and knock down a series of straw men. First, they contend that the D.C. Circuit unduly expanded the right of access by imposing an affirmative obligation to disclose information that might allow a citizen to sue. The mere withholding of information, they insist, does not violate the Constitution. This case does not, however, present that question. It involves an allegation that government officials deliberately lied for the express purpose of preventing access to courts. *See, e.g.*, Pet. App. 23a ("[T]he government misreads Harbury's complaint. She never alleges that defendants

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evidence that existed. The Fifth Circuit had no difficulty concluding that such a course of conduct represented "wrongful interference by the defendants with the Rylands' access to the courts." 708 F.2d at 973.

breached a duty to disclose information to her. Rather, she alleges that they affirmatively deceived her. . . ."). Harbury alleges a *negative prohibition* – government officials may not deliberately lie about the existence of critical facts for the purpose of shielding government conduct from a challenge in court.

Next, petitioners contend that the right Harbury asserts would transform every instance of official deception into an unconstitutional denial of access to the courts. But this "floodgates" argument is simply wrong – as petitioners' own examples prove. In none of the situations they posit did the Government act for the purpose of preventing an individual from testing the legality of government conduct in a claim presented to a court. Thus, sting operations may involve lies told by government officials, but the *purpose* is to discover evidence that will allow the Government to prosecute not, for example, to prevent a detainee from challenging the legality of his detention. *See* Pet. Br. at 19. Similarly, federal prosecutors may finesse an inquiry *in order to safeguard confidentiality*; a White House press officer may give a cagey response to inquiries about ongoing military operations *in order to protect those operations*; a Federal Reserve Board official may decline to provide information *in order to avoid destabilizing the economy*; and a FOIA clerk may issue a form letter indicating a prompt response is forthcoming despite his knowledge of a large backload of such requests, presumably in order to comply

with statutory requirements or internal regulations.[5] The dire consequences petitioners predict will simply not materialize.

Indeed, it is not the implications of recognizing this narrow right, but the implications of rejecting it that are far-reaching and extreme. Petitioners would have this Court hold that government officials are free to lie at will to citizens for the express purpose of shielding government conduct from judicial scrutiny. That principle has no limits. Thus, in petitioners' view, if an official engaged in a gross constitutional violation (beating a suspect to death, for example, in an attempt to extract a confession), no constitutional principle would prevent the official from lying to the victim's relatives about what had occurred to prevent them from suing the official. Similarly, if an official unlawfully detained an individual, no constitutional principle would prevent the official from lying about the whereabouts of that person to prevent others from going to court to seek his release. The rule posited by petitioners would not only encourage officials to lie, it would encourage them to lie vigorously and consistently. If the truth is never revealed, the official will never be penalized; if, by contrast, the truth is discovered, the official would be in no worse a position than if he had not engaged in a cover-up in the first place.

None of petitioners' remaining arguments warrants the adoption of such an extreme position. The national security interests to which they allude, *see* Pet. Br. at 21, 48, provide no

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[5]Moreover, such claims would almost certainly fail for lack of standing. Outside of certain alleged violations of the Establishment Clause, the Court has held firmly to the rule that plaintiffs do not have standing to bring claims against the Government unless they show direct, *individualized* harm as a result of government conduct. *See, e.g., United States v. Richardson*, 418 U.S. 166, 179-80 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 219-20 (1974).

basis for rejecting application of the right in this core context. As an initial matter, the vast majority of cases involving officials' deception designed to interfere with a citizen's ability to petition the courts do not implicate national security. And there is no need to distort the general rule to guard against the rare case in which national security is purportedly implicated. Adequate institutional mechanisms exist to safeguard the government's interests where national security is genuinely at stake. The Government is free to seek dismissal based on the national security defense.[6] If a court deemed it necessary to allow discovery before ruling on the defense, the state secrets privilege can be invoked. That privilege allows government officials to avoid submitting to discovery altogether on a showing that "there is a reasonable danger that compulsion of the [requested] evidence will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953).[7]

Other substantive and procedural safeguards address petitioners' remaining complaints. Specifically, petitioners assert that government officials will be exposed to excessive litigation because a plaintiff can always allege that preventing access to courts was one of many motives underlying a government official's deceit. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), however, this Court addressed these concerns.

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[6]Petitioners do not dispute this, but instead, curiously assert that the national security defense should rarely be invoked, and that this Court should decline to recognize this entire category of claims to guard against the remote possibility that there would ever be a reason to invoke it. Pet. Br. at 22.

[7]Such a showing can be made by submitting affidavits, *in camera* if necessary, to lend support to the rationale provided by defendants for invocation of the privilege. *Ellsberg v. Mitchell*, 709 F.2d 51, 58-59 (D.C. Cir. 1983); *Halkin v. Helms*, 690 F.2d 977, 992-93 (D.C. Cir. 1982).

There, the Court invalidated a rule adopted by the D.C. Circuit which required a plaintiff to prove an unconstitutional motive by clear and convincing evidence. The concern underlying the rule was the same as that raised here – claims regarding "an official's state of mind [are] easy to allege and hard to disprove." *Id.* at 585. As the Court explained, adequate safeguard already exist. Even "proof of an improper motive is not sufficient to establish a constitutional violation – there must also be evidence of causation." *Id.* at 593. In the First Amendment context, for example, once a public employee shows that "protected speech was a 'motivating factor' in an adverse employment decision," the burden shifts to the employer to show that "it would have reached the same decision in the absence of the protected conduct." *Id.* (*quoting Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). The employer prevails if it satisfies the burden. Accordingly, petitioners here could prevail if they demonstrate that they would have engaged in the same behavior to further some as yet unarticulated legitimate purpose, even if a desire to avoid litigation was also a "motivating factor."[8]

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[8]Other safeguards also exist that allow a court to "weed out baseless claims that feature a subjective element." *Id.* A district judge may, for example, "order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e)." *Id.* at 598. In addition, if the defendant pleads the affirmative defense of qualified immunity, the district court can "resolve that threshold question before permitting discovery." *Id.* Petitioners half-heartedly assert that these protections are insufficient to protect "the important benefits . . . [of] qualified immunity, which is an '*immunity from suit* rather than a mere defense to liability.'" Pet. Br. at 21 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (emphasis in original). *Crawford-El* disposed of this objection as well, however, noting that even though "[d]iscovery involving public officials is indeed one of the evils that [the doctrine of qualified immunity] aim[s] to address," the Court's decisions *never* created "an immunity from *all* discovery." 523 U.S. at 593 n.14 (emphasis in original).

That is not to say, however, that an official can avoid liability merely by asserting that his ultimate purpose was legitimate. Legitimate purposes may not be achieved via unlawful means. The right of access to the courts is violated when a government official deceives a citizen to insulate those means from judicial review. Thus, an official who beats a suspect to death while trying to extract a confession, then lies about it to avoid being sued, could not defend against an access to courts claim by asserting that his ultimate purpose was to deter crime. Similarly, in this case, if petitioners lied to Harbury in order to prevent her from going to court to test the legality of her husband's detention and torture, she has alleged a violation of her right of access to the courts even if petitioner's "ultimate purpose" was, for example, to obtain information about the insurgency in Guatemala. Petitioners could thus prevail only if they demonstrate they would have deceived Harbury for reasons wholly unrelated to a desire to prevent her from seeking to challenge the legality of officials' involvement in the detention and murder of her husband. Because she has alleged that they cannot do so, she has stated a claim of violation of the right of access to the courts.[9]

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[9]Harbury alleged that "Defendants intentionally misled Plaintiff . . . because, while [her husband] was still alive, they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture, and because, at all times, they did not want their role or the role of any of the other Defendants in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. . . . *Defendants feared that, if Plaintiff sought legal redress, these objectives would be undermined.*" J.A. 50 ¶ 171 (emphasis added).

II. PETITIONERS' ATTEMPT TO DISTORT THE LAW OF STANDING AND REMEDIES TO OBTAIN DISMISSAL OF THIS CLAIM MUST BE REJECTED.

None of petitioners' remaining arguments for reversal has merit.

A. Plaintiff Has Standing Because She Has Alleged Actual Injury.

Contrary to petitioners' claim, "exhaustion" of state court remedies is not a precondition to pleading an access to courts claim. Exhaustion applies where initial jurisdiction over a claim has been delegated to an agency or similar entities; "judicial interference is withheld until the administrative process has run its course." *United States v. Radio Corp. of America*, 358 U.S. 334, 346 n.14 (1959). Here, no claim has been entrusted to another agency in the first instance. Exhaustion is thus inapplicable.

Petitioners' argument regarding the degree of harm a plaintiff must demonstrate to state a claim is equally meritless. Specifically, petitioners assert that once a plaintiff learns of government officials' deception, she must bring the claims she would have brought had the deception not occurred. Pet. Br. at 24-25. If she obtains any relief whatsoever, no matter how ineffective, petitioners contend, she is barred from bringing an access to courts claim. *Id.* at 28-29.

That is not the law. As this Court explained in *Lewis*, principles of standing require a plaintiff alleging a violation of access to courts to demonstrate "actual injury." *Lewis*, 518 U.S. at 349. But injury is not cabined to cases in which all relief has been cut off. As the *Lewis* Court held, in the context

of an access to courts claim, injury exists if defendants' conduct "hindered [plaintiff's] efforts to pursue a legal claim," *id.* at 351, or, stated differently, that a "legal claim had been frustrated or was being impeded." *Id.* at 353.

Harbury meets that test. At the time petitioners lied to her, her husband was alive. But for the cover-up, she could have obtained information about his plight and sought injunctive relief that might have saved his life. Pet. App. 24a. The delay caused by petitioners' deception prevented her from doing so; by the time she obtained the relevant facts her husband had been killed. *Id.* Thus, her only avenue now is to seek damages against the officials involved. Petitioners suggest that damages are adequate, and urge this Court to hold that Harbury has not suffered cognizable injury even if she can demonstrate that petitioners' actions prevented her from obtaining an injunction that could have saved her husband's life. Pet. Br. at 27-29. No precedent, and no principle, countenances such a grotesque result.

The cases cited by petitioners are not to the contrary. Those cases stand for the proposition that harm cannot be assumed, but instead must be demonstrated. A plaintiff could do this by pursuing the claims she would have otherwise brought and, once those proceedings are concluded, filing a separate access to courts claim pointing to any prejudice she suffered. But she need not always pursue this particular course. Indeed, in certain circumstances it would be senseless to do so. Where events occurring during the time when critical facts were concealed will necessarily prevent a plaintiff from obtaining complete or effective relief, a plaintiff can allege harm without first seeking to vindicate her underlying claims. That is precisely what the court below concluded, and that eminently sensible conclusion should be affirmed.

B. *Parratt* Is Inapposite.

Petitioners' reliance on this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), is similarly misplaced, and their extended discussion of the adequacy of existing post-deprivation remedies is beside the point. *See* Pet. Br. at 26. In *Parratt*, the Court examined whether an official's negligent loss of a prisoner's property violated the prisoner's procedural due process rights given the existence of adequate post-deprivation procedural protections. 451 U.S. at 537. The question here is not whether petitioners provided respondent with adequate procedural safeguards before lying to her. Instead, Harbury has asserted a substantive right to access the courts that was abridged when the Government deliberately interfered with her ability to bring a claim. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (holding that the Due Process Clause "has been understood to contain a substantive component, . . . one 'barring certain government actions *regardless of the fairness of the procedures used to implement them*") (emphasis added). *Parratt* does not speak to that issue.

Moreover, petitioners misstate the breadth of *Parratt*'s holding. In *Parratt*, the Court concluded that post-deprivation processes can satisfy procedural due process requirements in certain circumstances involving the loss of property. This is true primarily where it is impractical to provide "a full and meaningful [pre-deprivation] hearing." 451 U.S. at 539-41. The mere fact that *some* remedy may later be available is insufficient, however. Such a post-deprivation hearing would not suffice for constitutional purposes if it did not provide "full compensation" for the lost property. *Id.* at 543-44; s*ee also id.* at 540 ("The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'")

(internal citation omitted). As this Court explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a post-deprivation process is constitutionally inadequate if it does not "make the complainant entirely whole." *Id.* at 436-37.

Thus, even if the notion of adequate post-deprivation process could somehow be imported into this context – and it cannot – the existence of other potential claims does not defeat Harbury's access to courts claim. The only opportunity to meaningfully redress the harm caused by Bamaca's capture and torture was extinguished as soon as he was killed. By lying and preventing her from testing the legality of the Government's actions, petitioners absolutely denied respondent a "meaningful" opportunity to bring a case that might have saved her husband's life. "[E]ven a successful suit will not vindicate entirely" the injury she suffered. *Logan*, 455 U.S. at 437.

Indeed, the "alternative remedies" suggested by petitioners are either irrelevant or inadequate. *See* Pet. Br. at 27-28; Gov. Br. at 13-18. The equitable tolling doctrine is inapplicable because Harbury's inability to obtain adequate relief is not a result of being time barred. Similarly, a cause of action for intentional spoliation of evidence is inapposite because Harbury does not assert that petitioners destroyed evidence, but that petitioners prevented her from discovering evidence until it was too late. Indeed, the Government chastises respondent for not taking advantage of FOIA before "emergency injunctive relief was no longer viable," despite the fact that it was government officials who lied to her precisely so that she would not seek information through such a channel. Gov. Br. at 17.[10]

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[10]The "discovery tools and judicial sanctions" petitioners allege can be used to "redress any alleged misconduct," Pet. Br. at 28; *see also* Gov. Br. at 15-16, are similarly inapplicable as the acts alleged did not take place during the course of a judicial proceeding. That "[c]riminal sanctions and

C. Respondent's Tort Claims are Valid.

Petitioners are thus left with the argument that even if they had not lied to her and she had all the information she now possesses, there was no claim Harbury could have brought. *See* Pet. Br. at 31. That argument is wrong. Harbury could have brought tort claims including intentional infliction of emotional distress or loss of consortium against petitioners in their individual capacity. These are well-established causes of action and, pursuant to each, injunctive relief can be obtained. Neither petitioners nor the Government disputes this. Instead, each resorts to conjecture about how such claims might have been litigated and why they might not have been successful. *See* Pet. Br. at 31; Gov. Br. at 24. In particular, both petitioners and the Government assume that had such a claim been brought, the Government would have certified that defendants were acting within the scope of employment, the Government would have thus been deemed the defendant, and the case would have been barred by the Federal Tort Claims Act. But none of this would necessarily have occurred. The Government, for example, might have declined to make the required certification. *See* 28 U.S.C. § 2679(d). That is not merely conjecture; this very case was litigated for almost *five years* before the Government chose

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penalties for obstruction of justice, tampering with evidence, perjury, or other illegal acts" could be initiated by the Department of Justice or some other law enforcement agency with jurisdiction over petitioners' misconduct, *see* Pet. Br. at 28-29; Gov. Br. at 14-15, is irrelevant. Even if a criminal case had been brought, it would not vindicate Harbury's claim. *See Ryland*, 708 F.2d at 973.

to make the certification necessary to transform the suit into one against the United States.[11]

This illustrates the wisdom of the rule that the right to bring claims that are "arguable (though not yet established)" is protected. *Lewis*, 518 U.S. at 353 n.3. A plaintiff who has been harmed by government officials' conduct is entitled to go to court and attempt to prove her claim. Years after the fact, it is easy to speculate about the chain of events that might or might not have occurred, and the various obstacles she might have encountered in doing so. But such a theoretical exercise does not defeat her right to present a claim unless it is *certain* that she could not have prevailed under any set of facts (that is, her claim was frivolous). *See, e.g., id.* Having successfully prevented her from presenting a claim, petitioners cannot now be heard to complain that had they not interfered, she might not have prevailed in any event. As the court of appeals correctly held, "*any* ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader." Pet. App. 63a (internal quotation and citation omitted).

D. Respondent Has a *Bivens* Action.

There is no merit to petitioners' contention that a *Bivens* remedy would be inappropriate in this context. *See* Pet. Br. at 33-39. First, petitioners seek to raise this issue for the first time in their merits brief, a practice prohibited by Rules 14.1(a) (limiting the issues this Court will consider to those "set out in

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[11]Moreover, even had the government chose to make the requisite certification, Harbury could have appealed on the ground that some or all of the conduct alleged fell outside the scope of their employment. *See, e.g., Nadler v. Mann*, 951 F.2d 301, 305-06 (11th Cir. 1992).

the petition, or fairly included therein"), and 24.1(a) (providing that a brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the petition). These rules apply with particular force where, as here, the issue was not passed on by the courts below. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). Accordingly, this Court should decline to address petitioners' *Bivens* argument.

In any event, the argument fails on the merits. No "special factors" counsel against a *Bivens* remedy here. First, Congress has not provided an adequate, alternative remedy. That counsels in *favor* of recognizing a *Bivens* remedy, because the whole point of *Bivens* was to provide a cause of action where alternative remedies were unavailable. *See Correctional Serv. Corp. v. Malesko,* 122 S. Ct. 515, 521 (2001); *Davis v. Passman*, 422 U.S. 228, 245 (1979).

It is no answer to point to the "comprehensive framework of statutory mechanisms for seeking information from the federal government." Gov. Br. at 27; Pet. Br. at 34. Each of the statutes cited by petitioners and the Government simply provides a mechanism through which individuals can seek access to information from the Government. None of the statutes is remedial in nature, and none purports to provide "meaningful, even if incomplete, relief" for the constitutional deprivation at issue here. Pet. Br. at 34.[12]

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[12]Although respondent is currently pursuing tort claims based on various officials' underlying conduct, those claims do not relate to the actions of the petitioners in this proceeding. Indeed, petitioners concede that, pursuant to this Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), the FTCA is not a meaningful, alternative remedy for the type of constitutional tort respondent has alleged, and, therefore, does not preclude her from seeking redress under *Bivens*. Pet. Br. at 34 n.12. *See Carlson*, 446 U.S. at 23 (holding that the "FTCA is not a sufficient protector of the

Nor do concerns about the federal fisc caution against recognizing a *Bivens* remedy in this case. *See* Pet. Br. at 37-38. This factor has been relied upon only once, in *FDIC v. Meyer*. In that case, the Court declined to imply a *Bivens* remedy in a suit against a federal agency based on the "potentially enormous financial burden" that might be imposed on the Government. 510 U.S. 471, 486 (1994). The claim here, however, is against petitioners in their individual capacities, not against a government agency. Any resulting liability would run only against the individuals named.[13]

Petitioners' suggestion that this case implicates national security does not alter the analysis. *See* Pet. Br. at 38-39. As discussed above, *see* pp.14-15, *supra*, the vast majority of access to courts cases do not touch on foreign affairs or national security. And, again, in the rare case in which national security is implicated, recognition of a *Bivens* remedy does not prohibit the proper invocation of the national security defense or the state secrets privilege. *Id.*

Finally, petitioners' reliance on *Malesko* is unavailing. In *Malesko*, the Court cautioned against applying *Bivens* remedies outside their original "context" – claims against individual federal officials. 122 S. Ct. at 521. The "new context" in *Malesko* was a claim against a private corporation operating under contract with a federal agency. *Id.* In declining to imply a *Bivens* remedy there, the Court relied on the concern that allowing suits against corporations would actually deter suits

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citizens' constitutional rights").

[13]Although the Government is permitted to indemnify petitioners in the event liability were established, it would not be obligated to do so. 28 C.F.R. § 50.15(a)(8)(iii).

against federal officials, because plaintiffs would be tempted to sue the entity most likely to satisfy a substantial judgment. *Id.* This, in turn, would frustrate a central objective of *Bivens* – deterring individual officials from engaging in unconstitutional conduct. *Id.*; *accord FDIC v. Meyer*, 510 U.S. at 486 (declining to extend *Bivens* to a claim against a federal agency). Here, the suit is against federal officials, and the concerns animating *Malesko* are not present.

III. PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The court below correctly concluded that petitioners are not entitled to qualified immunity. Petitioners acknowledge that courts of appeals should examine the opinions of other appellate courts to determine whether a "consensus of persuasive authority" existed during the relevant time period. Pet. Br. at 40. They nonetheless assert that the D.C. Circuit reached the wrong result in this case because it failed to recognize contrary decisions, and because it relied on decisions that postdated the events in question. Neither objection has merit.

At the time of the events alleged in the complaint, cases decided by three different courts of appeals had recognized that deliberate government interference designed to prevent a citizen from petitioning the courts violates the constitutional right of access to the courts. *See Barrett,* 798 F.2d at 575; *Bell,* 746 F.2d at 1261; *Ryland*, 708 F.2d at 973. No court of appeals had concluded otherwise. By the time the case was decided, two additional courts of appeals had reached the same conclusion. *See* Pet. App. 66a-67a (citing cases from the Second, Fifth,

Sixth, Seventh, and Ninth Circuits).[14] Although petitioners argue that these cases are distinguishable on their facts, Pet. Br. at 42-44, for a principle of law to be clearly established "the very action in question" need not have previously been held unlawful. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Instead, the law need only allow officials to "reasonably anticipate when their conduct may give rise to liability for damages." *Id.* (internal quotation marks and citation omitted).

This rule strikes a balance between "avoiding excessive disruption of government" and protecting the "public interest in deterrence of unlawful conduct and in compensation of victims." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). "'Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.' This is as true in matters of national security as in other fields of government action." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (*quoting Harlow,* 457 U.S. at 819); *see also Malley v. Briggs*, 475 U.S. 335, 343 (1986) ("[A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, . . . [b]ut such reflection is desirable.").

Because the relevant focus is whether, given existing case law, a reasonable official would have been aware that certain conduct was unlawful, the relevant inquiry in this case was not whether a case existed with this precise fact pattern, but "would

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[14] There is no disagreement that a court may not exclusively rely on cases post-dating the alleged misconduct in making a qualified immunity determination. Where a court justifies its decision on cases pre-dating the alleged conduct, however, a court cannot be faulted for taking note of more recent legal developments. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 618 (1999).

an objectively reasonable official have thought it clearly unconstitutional to affirmatively mislead [a citizen] for the express purpose of preventing her from filing a lawsuit?" Pet. App. 27a. As did the *Bell*, *Barrett* and *Ryland* courts before it, the D.C. Circuit correctly answered that question in the affirmative. *Id.* at 28a.[15]

Petitioners' attempt to distinguish *Bell* and *Barrett* on the ground that the conduct alleged there was "nefarious," Pet. Br. at 43, is unavailing. Neither *Bell* nor *Barrett* depended on that characterization of the underlying conduct but, even if they had, the allegations here – lies told to conceal ongoing detention and torture – would easily meet such a test.[16] Petitioners' assertion that there were "weighty justifications" for the conduct alleged

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[15]In *Bell*, government officials with various degrees of culpability covered up a shooting by a police officer. The Seventh Circuit concluded that in doing so, the defendants violated the victim's family's constitutional right of redress. 746 F.2d at 1261-62. In *Barrett*, the court upheld an access to courts claim against four federal attorneys who conspired to conceal the Army's involvement in a case where an experimental drug supplied by the Army Chemical Corps accidentally killed a psychiatric patient. 798 F.2d at 569-70; 575. In doing so, the court noted that as early as 1953 courts "had clearly enunciated that the Constitution protects causes of action from arbitrary interference. . . ." *Id.* at 575 (citations omitted). And in *Ryland*, where a prosecutor and two district attorneys prevented an investigation into a murder by the prosecutor and falsified the victim's cause of death, the Court found that where the complaint "alleged that agents of the state intentionally engaged in conduct that interfered with their exercise of their constitutionally protected right to institute a wrongful death suit . . . [such a] theory of recovery [wa]s a valid one." 708 F.2d at 973.

[16]Nor is the fact that the cover-up involved other governmental actors relevant – as the D.C. Circuit noted, "access to court claims are not restricted to cases in which officials are alleged to have covered up their own illegal actions." Pet. App. 65a (citing *Bell*, 746 F.2d at 1256-58; *Ryland*, 708 F.2d at 969).

here also fails. Respondent has *pled* that the purpose for petitioners' deception was not weighty and legitimate, but was invalid. Even further afield is petitioners' argument that respondent has not alleged that she has been denied *all* access to the courts. That goes to the level of injury a respondent must demonstrate to state a claim, *see supra* at 12-19. It says nothing at all about whether the conduct in question is proscribed.

Petitioners' reliance on *Ryland* and *Crowder* is similarly misplaced. In *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), the Fifth Circuit described *Ryland* as establishing that the right of access to courts is violated when "state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled." *Id.* at 812. Although it failed to find a constitutional violation in that case, the court did so because the plaintiffs did *not* allege a "cover-up." *Id.* at 813. Five years later, the Fifth Circuit again recognized that the right of access to the courts is violated when a government official's deception delays or blocks altogether a plaintiff's ability to file suit. *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (noting that the right was "clearly established in 1985-1988").[17]

Indeed, contrary to petitioners' assertions, developments in the law since 1994 actually bolster the decision below. Each of the courts of appeals to consider the issue since that time has added to the consensus of courts holding that a public official

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[17]The *Foster* court ultimately concluded that the plaintiffs in that case could not overcome qualified immunity because the claim was not that defendants impeded the plaintiffs' ability to file suit, but instead that defendants suppressed evidence after suit was filed, during the course of discovery. 28 F.3d at 427.

may not mislead citizens for the purpose of preventing a suit designed to test the legality of governmental conduct. *See, e.g., Vasquez*, 60 F.3d at 328-29; *Swekel*, 119 F.3d at 1262; *Delew v. Wagner*, 143 F.3d at 1222. Any perceived disagreement that has developed among the circuits with respect to "an exhaustion requirement" is irrelevant. Even if such disagreement exists, it goes only to the procedural steps a plaintiff must complete before bringing an access to courts claim, not to whether a government official is proscribed from engaging in certain conduct in the first instance.

Finally, the mere fact that this Court has granted certiorari to review this case does not provide a sufficient basis on which to ground a finding of qualified immunity. *See* Pet. Br. at 47-48. Certiorari may be granted for reasons that may or may not implicate the validity of the challenged conduct. Indeed, this Court has previously granted certiorari on a qualified immunity issue, then gone on to find that qualified immunity does not attach in that very case. *See, e.g., Malley*, 475 U.S. at 345-46.[18] Thus, the appropriate resolution of a qualified immunity defense is necessarily case-specific. Contrary to petitioners' assertions, the Court of Appeals properly resolved the issue here.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[18]In *Malley*, even though the district and appellate courts disagreed, and even though this Court granted certiorari to review the question, it concluded that qualified immunity should not attach because the underlying law was sufficiently clear.

Respectfully submitted,

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